BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34619

MICHELLE JONES, in her capacity as Administratrix of the Estate of Julia Toler, Deceased,

Appellant,

v.

EDWARD R. SETSER, M.D.; ST. MARY'S HOSPITAL OF HUNTINGTON, INC.; and HUNTINGTON CARDIOTHORACIC SURGERY, INC.,

Appellees.

CORRECTED REPLY BRIEF OF APPELLANT

Respectfully submitted,

Marvin W. Masters, Esquire
West Virginia State Bar No. 2359
Richard A. Monahan, Esquire
West Virginia State Bar No. 6489
THE MASTERS LAW FIRM LC
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106

Julie N. Garvin, Esquire
West Virginia State Bar No. 8567
GARVIN LAW, LLC
424 Buckhannon Pike, Suite C
Nutter Fort, West Virginia 26301
(304) 623-3333
Counsel for Appellant

TABLE OF CONTENTS

I. INTRODUCTION

In Appellees' response brief, they first set out their version of the detailed facts of the case, including what the Appellant's allegations and defenses were in the case. Appellees did not designate the record from which to recite the facts they proclaim and some allegations are not of record below whatsoever.

The Appellant's position is that the parties to the appeal should stay within the accurate record below in either presenting the appeal or defending the appeal. Appellees, however, use their response brief as another opportunity to take a swipe at Appellant's counsel and Appellant's expert without even a record to support it. Obviously, this is another attempt at prejudice.

The error alleged here would apply to the underlying facts in any medical malpractice trial. Obviously, detailed facts of liability and defense would be important to the trial court, but since there was no summary judgment or directed verdict, this case was completed except for closing argument when the error occurred. As Appellant stated in her petition and appeal brief, the trial court, to Appellant's knowledge, did not commit any errors in this case until defense counsel violated the motion *in limine*. Regardless of the motion *in limine* and order granting it, defense counsel committed reversible error by intentionally introducing the medical malpractice litigation crisis into the trial.

II. FACTS

As Appellees claim, this case did involve an open heart re-do of Mrs. Julia Toler's mitral valve. Appellant's expert, Dr. Herman, did testify that it was a deviation in the

standard of care to do this re-do surgery without CT scan where there were wires and scar tissue from the former surgery. Dr. Herman identified medical authority in support of his opinion that CT scans were the standard of care. The purpose of the CT scan is to locate exactly where the aorta is located and whether scar tissue is in contact with the aorta. Dr. Herman testified that it is known that scar tissue will cause an aortic tear if it attaches to the aorta and that it is an unnecessary risk to do the surgery without the benefit of a CT. Dr. Herman's opinion was that had the CT scan been done it would have been clear where the aorta was and the surgery could have been performed safely by bypassing the heart before surgery.

In what seemed to Appellant to be an absurd position, Appellees contended that a CT scan would be of no help and was not necessary. Appellees further contended it was not necessary to prepare the patient for a catastrophic bleed. Either of these scenarios would have saved Mrs. Toler three years and four months of living as a total quadriplegic, but conscious and ultimately dying.

With respect to the error that Appellant complained of in her appeal, Appellees claim, "Appellant's counsel objected and the Court sustained the objection. Counsel for Appellees moved immediately to other arguments." Appellees' Brief at pp. 12-13. Appellant disagrees that the statement fairly describes what occurred. Defense counsel did not go on immediately to other arguments. Instead, defense counsel continued the theme, adding plaintiff's counsel and expert were essentially frauds, and the trial court allowed him to continue over plaintiff's objection. *See* Appellant's Brief at pp. 2-6.

III. ARGUMENT AND AUTHORITIES

Appellees' argument boils down to the following points:

(1) Appellant waived the objection by not requesting a curative instruction.

(2) The argument did not violate the motion *in limine;* and even if it did violate the motion *in limine* it was inadvertent and was not intentional.

(3) Appellant was not prejudiced and there was no manifest injustice.

(4) Appellant did not prove Appellees violated the medical standard of care.

(5) Plain error can only apply where a party fails to object, and plain error does not exist because Appellant invited the error by not requesting a curative instruction.

A. DEFENDANTS' CONDUCT WAS INTENTIONAL AND PREJUDICIAL.

Defense counsel injected the tort reform movement's manufactured "litigation crisis" into the trial in closing argument. This subject has varied meanings to different people and comes in many forms. But the gasoline that ignites the flames certainly includes lawsuits against doctors, particularly in West Virginia. Only a few years ago, West Virginia was a battleground for medical malpractice tort reform with doctors leaving the state because of "frivolous" lawsuits. The advertisements were everywhere and news stories abounded concerning the fact that there was a medical malpractice litigation crisis. Doctors had signs in their offices addressing the issue. The impact of this public relations blitz led to a complete overhaul of W. Va. Code, § 55-7B. The West Virginia Legislature declared in part:

> That the cost of liability insurance coverage has continued to rise dramatically, resulting in the state's loss and threatened loss of physicians, which, together with other costs and taxation incurred by health care providers in this state, have created a competitive disadvantage in attracting and retaining qualified physicians and other health care providers.
>
> The Legislature further finds that medical liability issues have reached critical proportions for the state's long-term health care facilities[.]

W. Va. Code, § 55-7B-1. Appellees' position is that their argument to the jury that injected a published cartoon in the case making light of and criticizing a dead person who wants to "sue doctors" does not relate to the litigation crisis.

Interestingly, Appellees do not mention in their brief that defense counsel followed the cartoon with the statement, "I think this is a reflection of society today. . . ." Nor does Appellees discuss defense counsel's follow-up argument that (a) regardless of the outcome Appellant's counsel and Appellant's expert would have sued the doctors and "would have been in here criticizing him for doing an unnecessary procedure"; (b) "[y]ou can take a bad result and turn it into a malpractice case every time"; (c) "[w]e're fortunate to have well-trained and caring physicians like him ... to treat us and our loved ones"; (d) "[i]f we hold them to an infallible standard, they simply can't practice"; and (e) "Mr. Masters and his expert, Dr. Herman, will take a bad result and turn it into malpractice every time." Appellant's Brief at pp. 2-3 & 5-6, emphasis added.

Appellees actually contend that the above was not knowingly designed to push the emotional buttons of the jurors. Obviously, the pre-planned attack was aimed at reminding the jury of "frivolous lawsuits" against doctors and to prejudice the jury

against Appellant's attorney and expert. If that was not what defense counsel intended, then what could it possibly have been?

There was no evidence presented during the trial about too many lawsuits against doctors, what society had become, that Appellant's counsel and expert would have sued if the defendants had done a CT scan, and the other standards which Appellant's expert indicated were required. If the argument was not solely to inflame the jury, what was it for? If there were no facts to support the argument, what relevance did it have to the case?

1. Arguing The Doctors Will Not Be Able To Practice Because Of Lawsuits Is Prejudicial.

It is important to acknowledge that Appellees have made no attempt to discuss, refute, or distinguish the cases cited by Appellant wherein courts have found reversible error to occur upon defendants making improper pleas to the local sentiment, bias, passion, fears, and prejudice of juries concerning the reputation of local defendant doctors and/or their ability to continue practicing medicine in the area due to lawsuits. *See Rush v. Hamdy*, 255 Ill.App.3d 352, 359-60, 627 N.E.2d 1119, 1123-24 (1993) ("Defense counsel's remarks that Hamdy's professional reputation was `on the line' or `at stake' were improper as they were not supported by the evidence. Commentary in closing argument is limited to facts in evidence. . . . Even in the absence of the *in limine* order, counsel's comments were inappropriate. A reference to the impact of an adverse verdict upon defendant's professional reputation is improper as it interjects an improper element into the case and is little more than an appeal to the passions and

sympathy of the jury."); *Torrez v. Raag*, 43 Ill.App.3d 779, 782-84, 357 N.E.2d 632, 634-35 (1976) (affirming award of new trial in a "close case" evidence-wise, where defense counsel remarked in closing that he was concerned about physician's continued right to practice medicine as a result of lawsuit, despite that objection was sustained, remark was never completed, and motion for mistrial was not made); *Kuhnke v. Fisher*, 210 Mont. 114, 121-23, 683 P.2d 916, 920-21 (1984) (reversing denial of new trial where defense counsel made several improper remarks in closing including a "Good Samaritan" argument on behalf of doctor who rendered emergency care without compensation, referenced effect of lawsuit on doctor's reputation in violation of ruling of motion *in limine*, and made an appeal to the local prejudice and passion of jury for local doctor); *Pederson v. Dumouchel*, 72 Wash.2d 73, 83-84, 431 P.2d 973, 980 (1967) (finding remarks of defense counsel intended "to turn the jury into a hometown rooting section" for doctor to be improper and holding that "[a] case should be argued upon the facts without an appeal to prejudice").

In the present case in direct violation of the trial court's order granting plaintiff's motion *in limine* concerning prohibiting any arguments regarding litigation crises, defense counsel without warning showed the jury the "Wizard of Id" cartoon--depicting a fortune teller advising a loved one that her recently departed uncle wanted her to sue his doctor—and argued that suing doctors has become a reflection of society today. To make matters worse, defense counsel also proceeded to instruct the jury how fortunate we are to have such well-trained and caring physicians like defendant Dr. Setser and others in our geographical area and to warn them that such well-trained and

caring doctors will not be able to continue practicing in our area if held to the standard of care which defendants inaccurately proclaimed plaintiff was insisting upon in this case. Clearly, consistent with the holdings of the above cases, these arguments were improper and prejudicial appeals to the local sentiment, passion, bias and fears of the jury and as such constituted reversible error.

2. Arguing That Plaintiff's Counsel And Expert Are Dishonest Is Prejudicial.

It must also be noted that Appellees have made no attempt to discuss, refute, or distinguish the cases cited by Appellant wherein courts have found reversible error to occur when counsel, without support from the evidence of record, makes attacks upon or impugns the character, integrity, honesty, or credibility of opposing counsel or witnesses. *See Roetenberger v. Christ Hosp.*, 163 Ohio App.3d 555, 559-62, 839 N.E.2d 441, 444-47 (2005) ("`When argument spills into disparagement not based on any evidence, it is improper.' . . . Counsel is obligated to refrain from unwarranted attacks on opposing counsel, the opposing party, and the witnesses. . . . It is the trial court's duty to see that counsel's statements are confined to proper limits and to prohibit counsel from creating an atmosphere of passion and prejudice or misleading the jury. . . . Abusive comments directed at opposing counsel, the opposing party, and the opposing party's witnesses should not be permitted. . . . If there is room for doubt about whether counsel's improper remarks may have influenced the outcome of the case, that doubt should be resolved in favor of the losing party. . . ."); *Geler v. Akawie*, 358 N.J. Super. 437, 463-72, 818 A.2d 402, 418-24 (2003) (court finding attorney misconduct in closing argument and

awarding new trial; noting in part that "trials must be conducted fairly and with courtesy toward the parties, witnesses, counsel, and the court" and "Yet despite our clear precedent, counsel filled his closing argument with derisive and derogatory comments regarding defendants, their counsel, their witnesses and their evidence in general, the cumulative effect of which undoubtedly affected the jury's deliberations."); *Berkowitz v. Marriott Corp.*, 163 A.D.2d 52, 53-54, 558 N.Y.S.2d 511, 512 (1990) (reversing verdict and awarding new trial where counsel in his summation "engaged in an unfair and highly prejudicial attack upon the credibility and competence of defendants' expert witnesses and attorneys"; including referring to experts as "hired guns" brought in to "fluff up the case" and "fill up some time"); *Board of County Commissioners v. GLS LeasCO, Inc.*, 394 Mich. 126, 130-39, 229 N.W.2d 797, 800-04 (1975) (finding repeated improper remarks and attacks on opposing counsel); *United States v. Holmes*, 413 F.3d 770, 774-77 (8th Cir. 2005) (reversing verdict and awarding new trial based upon improper comments during closing argument; holding that "personal, unsubstantiated attacks on the character and ethics of opposing counsel have no place in the trial of any criminal or civil case"; finding comments that opposing counsel and party was trying to distract and change the focus of jury's attention elsewhere and needed to get their stories straight constituted an implicit accusation that opposing counsel and his party were conspiring to fabricate testimony); *State v. Smith*, 167 N.J. 158, 177-89, 770 A.2d 255, 266-73 (2001) (finding prosecutors comments during closing argument that defense experts charged "hefty fees" which would "influence them to shade their testimony" because they "hope[d] to get hired by persons in the future in similar situations" were

egregious and required a new trial); *Jenkins v. State*, 563 So.2d 791, 791-92 (1st Dist. Ct. App. 1990) (finding prosecutor's comments during closing accusing defense counsel of further victimizing the victim and of seeking an acquittal at all costs rather than searching for the truth constituted a personal attack on opposing counsel which was clearly improper); *People v. Tyson*, 423 Mich. 357, 373-76, 377 N.W.2d 738, 745-47 (1985) (finding reversal and new trial required where prosecutor improperly argued during closing that defense expert only testified on behalf of defendant because he was paid).

In the present case, in the midst of making the other improper and prejudicial arguments to the jury noted above, defense counsel also proceeded without any evidentiary support in the record to attack the honesty, credibility, and integrity of plaintiff's counsel and expert witness by arguing that had the defendants followed the precise standard of care advanced by plaintiff's counsel and expert witness as being required in this case, plaintiff would have still sued defendants because plaintiff's counsel and expert witness would have then found fault with such standard of care and instead advanced a different standard of care. Indeed, defense counsel argued that "Mr. Masters and his expert, Dr. Herman, will take a bad result and turn it into malpractice every time."

It is one thing to argue that doctors face difficult decisions in deciding which procedure to recommend and that a bad result can occur with any procedure without any negligence being committed by doctors. However, it is quite another thing to argue that a particular attorney and expert witness will every time turn any bad result into malpractice, even if it requires them to attack and refute the very standard of care which

they have advanced as being required in the case. The former argument may indeed have support in both the evidence of record and the applicable law. The latter argument has absolutely no support in the evidence of record and constitutes a blatant attack on the integrity, credibility, and honesty of plaintiff's counsel and expert witness. For reasons addressed in the above cases, such arguments when made without any evidentiary support in the record have no place in closing arguments and constitute highly improper and prejudicial remarks which require reversal.

B. APPELLANT DID NOT WAIVE THE ERROR.

The one function of a motion *in limine* is to eliminate from the trial of a case any mention by witnesses or attorneys, either by evidence or argument, some extremely prejudicial fact, circumstance or allegation that if mentioned in front of the jury would result in prejudicing the jury against one party. Consequently, the motion is generally made prior to trial out of the presence of the jury. The trial court may grant or deny the motion. It is as important to the party making the motion to know one way or the other whether the evidence or argument is something that will come into evidence or not. Why? Because worse than it coming into evidence is being caught flatfooted at the end of trial or in closing argument with it coming in having never addressed it in *voir dire*, opening statement, plaintiff's case in chief, or in cross-examination.

The function of the motion *in limine* is to set certain evidentiary and argument rules for a particular case before trial so all parties, particularly the one who may be prejudiced, knows what issues need to be addressed in *voir dire*, opening, and in the case in chief. It more than doubles the prejudice when the violation of a motion *in*

limine is sprung on a party after relying on the trial court's order precluding evidence from the case.

The most damaging circumstance is a violation of the motion *in limine* where the order precludes evidence or argument that casts the litigant in a negative light. It could be alcohol or drug use, marital difficulties, or any number of different facts or circumstances. But motions *in limine* can also be utilized for other purposes; for example, to avoid wasting time on issues that even though are not prejudicial to either party would unnecessarily lengthen the trial. No matter the reason for the motion *in limine*, if it is violated in the middle of trial, it may seriously prejudice a party because the party has not prepared to address the issue, has not prepared the jury for the issue, and has not even "voir dired" the jury on the issue. It leaves that litigant appearing to the jury to have hidden a fact or circumstance from them, and makes the party violating the motion appear as if they are disclosing some important issue or fact to the jury which the other party does not want disclosed. It inevitably and effectively attacks the credibility of the adverse party. Therefore, there is no way to recover from the violation of a motion *in limine*. The violation is meant to attack the credibility of the other party and, in layman's language, is the sucker punch of trial advocacy.

If the trial court concludes that the evidence is so prejudicial it should not be mentioned, and so orders, then why does it require the party prejudiced to even object or make any further motions to preserve the error? No one wants to re-try a case unless you are the insurance company who believes the case may be lost. How absurd is it to begin a trial saying it is prejudicial to mention the evidence and then say, "Oh, adverse

counsel introduced it anyway over the court's order, but now we are going to re-evaluate it to see whether the innocent party could have been saved prejudice by the trial court stopping the trial and explaining to the jury how they should not hold the prejudicial evidence against the innocent party." Who, under that rule of law, would not continue to violate motions *in limine* when it advantages their clients and there are no consequences for violating it?

Appellees cite several cases in support of their argument that Appellant waived any objection to improprieties in their closing argument by failing to also request a curative instruction from the court. However, appellees fail to acknowledge that none of these cases involved alleged error which was the subject of a prior order granting a motion *in limine* seeking to prohibit such matters or which rose to the level of plain error. *See Rowe v. Sisters of Pallottine Missionary Society*, 211 W.Va. 16, 26 n. 6, 560 S.E.2d 491, 501 n. 6 (2001); Syl. Pt. 6, *Yuncke v. Welker*, 128 W.Va. 299, 36 S.E.2d 410 (1945); Syl. Pt. 6, *McCullough v. Clark*, 88 W.Va. 22, 106 S.E. 61 (1921); *Skibo v. Shamrock Co., Ltd.*, 202 W.Va. 361, 365, 504 S.E.2d 188, 192 (1998); *Pasquale v. Ohio Power Co.*, 187 W.Va. 292, 418 S.E.2d 738 (1992); *State v. Guthrie*, 205 W.Va. 326, 336, 518 S.E.2d 83, 93 (1999); *State v. Lewis*, 133 W.Va. 584, 608, 47 S.E.2d 513, 528 (1949). Accordingly, such opinions are distinguishable from the present case.

Furthermore, it is interesting to note that some of the above decisions and/or some of the decisions cited as support therein do not in reality state that a counsel must both object to an improper remark in closing argument and also seek a curative instruction. For instance, Syllabus Point 6 of *Yuncke v. Elker, supra*, holds: "Failure to

make timely and proper objection to remarks of counsel made in the presence of the jury, during the trial of a case, constitutes a waiver of the right to raise the question thereafter either in the trial court or in the appellate court." No mention of the necessity of a request for a curative instruction is contained in such holding of the Court. Moreover, within the body of the opinion the Court stated:

> But if [the remarks of counsel during closing argument] should be regarded as prejudicial, the defendant, in failing to make timely and proper objection, by motion for a mistrial **or** for an instruction by the court to disregard them, **or** by other appropriate method, and thus give the trial court an opportunity to do so before the verdict was returned, waived the effect of the prejudicial remarks. . . .

Yuncke v. Welker, 128 W.Va. at 311, 36 S.E.2d at 416 (emphases added; citations omitted).

It should also be noted that while this Court did state in footnote 6 of *Rowe v. Sisters of Pallottine Missionary Society*, that "a party's failure to make a timely objection to improper closing argument, and to seek a curative instruction, waives the party's right to raise the question on appeal," *id.*, 211 W.Va. at 26 n. 6, 560 S.E.2d at 501 n. 6 (citing *Yuncke v. Welker*, *supra*, and *McCullough v. Clark*, *supra*), Justice Davis in a separate opinion, concurring, in part, and dissenting, in part, in which Justice Maynard joined, disagreed on this point, explaining:

> The majority opinion contends that a proper objection to the above statement was not presented. However, the record reflects differently. Immediately after plaintiff's counsel concluded the first half of closing argument, defense counsel approached the bench and motioned for a mistrial. For reasons not apparent in the record, the initial discussion of this matter was off the record. However, once the jury retired to deliberate, the issue was placed on the record . . . .
>
> * * *

> The manner in which defense counsel objected in this case was consistent with Rule 23.04(b) of the West Virginia Trial Court Rules, which states in part that "[c]ounsel shall not be interrupted in argument by opposing counsel, except as may be necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection." Rule 23.04(b) relaxes the general requirement of contemporaneous objection for closing argument purposes. *See Lacy v. CSX Transp. Inc.*, 205 W.Va. 630, 639, 520 S.E.2d 418, 427 (1999) ("Rule 23.04 ... disfavors objections by counsel during closing arguments."). Therefore, this issue was properly preserved for appellate review and should have been addressed by the majority opinion.

Rowe, 211 W.Va. at 26-27, 560 S.E.2d at 501-02 (Davis, J., concurring, in part, and dissenting, in part).

While then-Chief Justice McGraw, in a separate concurring opinion, disagreed with Justice Davis' partial dissent, he distinguished the case from one involving a prior motion *in limine*, stating, in part:

> Appellant did not contemporaneously object to [an allegedly improper racehorse analogy made during closing argument]. My dissenting colleagues suggest that the appellant's counsel did not need to contemporaneously object, concluding that of [sic] the West Virginia Trial Court Rule 23.04(b) "disfavors objections by counsel during closing arguments." *Lacy v. CSX Transp. Inc.*, 205 W.Va. 630, 639, 520 S.E.2d 418, 427 (1999). I must point out at the outset that in *Lacy* the challenging party had previously objected by way of a motion *in limine*, and the Court merely indicated that in such context a contemporaneous objection was unnecessary and, as a result, disfavored under Rule 23.04(b). The Court in *Lacy* by no means suggested or implied that the longstanding requirement of a contemporaneous objection was abrogated by adoption of Rule 23.04(b).
>
> Appellant argues that it could not fairly object to appellee's argument without drawing it undue attention. The problem with this position is that the record shows that appellant's counsel was ready, willing, and able to contemporaneously object to other comments made by appellee's counsel. The record reflects that, subsequent to appellee's racehorse analogy, [appellant's counsel objected in the jury's presence to an allegedly improper, unrelated comment]. . . .

> In [such latter] instance, appellant's counsel properly interrupted "argument by opposing counsel ... [as was] necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection." W.Va. Trial Ct. R. 23.04(b).

Rowe, 211 W.Va. at 28, 560 S.E.2d at 503 (McGraw, C.J., concurring).

The fact that then-Chief Justice McGraw, after noting the general requirements that a party make a timely objection to allegedly improper closing argument and seek a curative instruction, submitted that "[o]ur statement in *Lacy v. CSX Transportation, Inc., supra*,--that objections during closing arguments are `disfavored' where the challenging party has already sought and obtained a ruling *in limine* on an anticipated line of argument—did noting to alter these requirements", does not help Appellees in the present case where Appellant's counsel both had filed a prior motion *in limine* and made contemporaneous objections to the improper closing argument.

C. PLAIN ERROR DOES NOT REQUIRE OBJECTION.

Appellees make the nonsensical argument that Appellant cannot rely upon the plain error doctrine because Appellant's counsel did make objections to the improper closing argument of Appellees. The point of the plain error doctrine is that some error is so egregious and substantial that a court is bound to recognize it and correct it even if a party has neglected to timely or sufficiently bring it to the court's attention through proper procedures such as objections. *See State v. Keesecker*, 222 W.Va. 139, 663 S.E.2d 593 (2008); *Radec, Inc. v. Mountaineer Coal Development Co.*, 210 W.Va. 1, 552 S.E.2d 377 (2000). Obviously, if an error is so egregious and substantial to justify the invocation of

the plain error doctrine in a case where a party failed to raise any timely objection to such error, it is severe enough to require reversal in all cases, including those cases where a party did not fail to object at all but perhaps failed to object in the proper form or manner. In the present case, Appellees argue that Appellant's timely objections are insufficient because they were unaccompanied by a request for a curative instruction. If Appellant's counsel's failure to accompany such objections with requests for curative instructions were indeed errors, they do not alter the fact that Appellees' counsel's remarks during closing argument were so egregious and substantial to require reversal under the plain error doctrine even had Appellant's counsel failed to raise any objection at all.

D. PARTIES DO NOT INVITE ERROR BY FAILING TO REQUEST A CURATIVE INSTRUCTION.

Appellees make the further meritless argument that Appellant cannot rely upon the plain error doctrine because Appellant's counsel "invited" the error by failing to request a curative instruction. While it is true that this Court has held that where a party knowingly and intentionally invites or creates an error through its own conduct it may not invoke the plain error doctrine in order to escape the consequences of its own knowing and intentional conduct, such "invited error" doctrine does not apply where a party simply fails to object or request a curative instruction. *See Radec, Inc.*, 210 W.Va. at 8, 552 S.E.2d at 384 (discussing "invited error" and waiver doctrine in case where defense counsel not only failed to submit instructions containing the *Garnes* factors

relevant to requests for punitive damages but objected to plaintiff's proposed jury instructions containing the *Garnes* factors).

Appellees also cite cases for purposes of noting that courts have held in certain cases that parties may include in their closing arguments various tools for purposes of conveying their theory of the case, including, but not limited to, cartoons, jokes, and quotations from the Bible, poetry, or prose. While it is indeed true that counsel is granted great and wide latitude in making their closing arguments, such allowance does not alter the legal requirement that "counsel [in doing so] must keep within the evidence, not make statements calculated to inflame, prejudice or mislead the jury, nor permit or encourage witnesses to make remarks which would have a tendency to inflame, prejudice or mislead the jury." Syl. Pt. 2, *State v. Kennedy*, 162 W.Va. 244, 249 S.E.2d 188 (1978). *Accord* Syl. Pt. 8, *Mackey v. Irisari*, 191 W.Va. 742, 445 S.E.2d 742 (1994); Syl. Pt. 1, *Lacy v. CSX Transportation, Inc.*, 205 W.Va. 630, 520 S.E.2d 418 (1999). In the present case, for reasons already noted herein as well as in Appellant's initial brief, Appellees have went far beyond the bounds of proper and permissible closing argument and have done so to a degree which requires reversal and sanctions.

E. THE RECORD DOES NOT SUPPORT APPELLEES' ARGUMENT THAT THE APPELLANT DID NOT PROVE A VIOLATION OF THE STANDARD OF CARE.

No one designated the entire record or sufficient record to make a claim that the standard of care was not proven to be violated. Yet, Appellees take that position and recite detailed facts of what occurred in the trial. Obviously, the trial court found sufficient evidence for the case to go to the jury. Appellant contends that the jury was

prejudiced against her by the improper argument of Appellees' counsel and did find against Appellant rather promptly. The courtroom, frankly, was turned into a witch-hunt with Appellant, her attorneys and expert the target.

The only issues in the case were whether the standard of care was violated and whether such negligence proximately caused the plaintiff decedent the severe damages she sustained. There is absolutely nothing in defense counsel's diatribe that addresses any of the real issues in the case.

IV. RESPONSE TO CROSS ASSIGNMENT OF ERROR

A. STATEMENT OF FACTS.

Appellees never identified any radiologist as an expert and never identified Dr. Blake as a witness, period, until his name appeared in the Appellees' pretrial memorandum. Dr. Blake was a radiologist who reviewed a chest x-ray for purposes of clearing Mrs. Toler for surgery, not for helping the cardiothoracic surgeons determine the correct surgical procedures. All Dr. Blake did was report on the normal findings of a routine chest x-ray.

Admittedly, Appellees never disclosed Dr. Blake even as a witness in their April 2, 2004 disclosure of witnesses or their disclosure of experts on September 1, 2004, June 4, 2007, and August 31, 2007, even though there were disclosure deadlines by court orders dated April 16, 2007, May 23, 2007, and January 25, 2008. *See* Supplemental Record 001, 007, 011, 013, 033, 035 and 079. The case was scheduled for trial October 1, 2007, but was continued to May 2008, as a result of the trial judge becoming ill.

As the trial court noted, the defendant surgeon, Dr. Setser, did not even look at or refer to Dr. Blake's radiology report prior to or during surgery. The trial court ruled "it is therefore ... not relevant to what he [Setser] did, since he did not look at it. And any opinion by Dr. Blake would have to be an expert opinion based upon those matters, . . ." The trial court concluded that Dr. Blake was not disclosed as an expert and had to be excluded. Trial Transcript Excerpt, May 20, 2008, at pp. 6-8, and Supplemental Record 0215. *See also*, Supplemental Record 0214, and Trial Transcript Excerpt, May 22, 2008, at pp. 5-6.

Appellees vouched the record with Dr. Blake. It is clear from the vouch that Appellees intended to call Dr. Blake as an expert on one of the most critical pieces of evidence in the case, which was: "Q. And can you, as a radiologist, determine the relative distance between the ascending aorta and the sternum?" Dr. Blake gave that opinion in the vouch. *Id.*, May 22, 2008, at p. 10, and Supplemental Record 0214. Dr. Blake also offered the opinion that a fuzzy area on the x-ray was fat and other areas were lung, etc. This contradicted other evidence in the record. He also claimed there was no evidence of the aorta adhered to the sternum. Trial Transcript Excerpt, May 22, 2008, at pp. 10-11.

Since no radiologist had ever been identified by anyone in the case or even a witness, let alone an expert witness, and since no expert indicated that they relied on radiologists in preparing for the surgery or doing the surgery, Appellant did not consult or name a radiologist. This was further confirmed by Appellees themselves and their

experts. Dr. Setser testified, as the trial court noted, that he did not even refer to the radiology report.

A more interesting discovery from the vouch, however, was the fact that Dr. Blake had been previously questioned by a different law firm about the x-ray prior to the October 2007 trial. The question occurred to Appellant why Appellees were so confident about Dr. Blake's opinion that they wanted to offer it to the jury when they claimed they had never talked to him. The following was Dr. Blake's testimony:

[BY MR. MASTERS:]

Q. My question was when did you talk to Mr. Offutt about it?

MR. OFFUTT: Your Honor, I never talked to Dr. Blake. West Virginia law prohibits --

THE COURT: Let him answer.

THE WITNESS: I don't remember who I talked to. I believe I was contacted by someone out of Don Sensabaugh's office. Don Sensabaugh, as far as I know, is retained by our malpractice insurance carrier, and I think he was the one that asked me to look at the film.

BY MR. MASTERS:

Q. You were not a defendant in the case?

A. That's correct.

Q. And he wanted you to go over the film with him?

A. I was asked to review -- I was asked to review the film. And this was long enough ago that I don't really remember who I talked to. I thought the request came out of Don Sensabaugh's office. All I know is Lynn, who is our secretary said, Hey, you need to look at this film. And I don't remember whether the film was just in a jacket and I had to look at it or whether there was someone that

came and asked me. I mean that was six months ago. I don't remember who I talked to.

Q. Do you know Dr. Setser?

A. Yes.

Q. Do you know Dr. George?

A. Yes.

Q. Have you ever talked to them about this case?

A. No.

Id., May 22, 2008, at pp. 13-14, and Supplemental Record 0214. Neither defense counsel nor defendants claimed they had ever talked to Mrs. Toler's treating radiologist, yet they were calling him at the last minute to discuss critical issues in the case. *See also* Supplemental Record 0215 and Trial Transcript Excerpt, May 20, 2008, at p. 8. On the other hand, in a case where Dr. Blake was not a defendant, he was questioned prior to the earlier-scheduled trial date by his malpractice carrier's lawyer about the very film for which Appellees' counsel were wanting to put him on the stand. It is also important to note that the court had earlier made clear to the parties that "no new opinions would be allowed" and based upon that the court excluded some opinions by Appellant's expert. *Id.*, May 20, 2008 at 5-6.

Obviously, Appellant relied upon the Appellees' disclosures and testimony in deciding no radiologist testimony would be offered. Therefore, Appellant would have been greatly prejudiced if Dr. Blake, Mrs. Toler's own treater, would have appeared against her as a surprise witness. This Court has held that prejudice to the opposing

party is the first consideration in determining whether to allow an undisclosed witness to testify. *See Martin v. Smith*, 190 W.Va. 286, 438 S.E.2d 318 (1993); *Prager v. Meckling*, 172 W.Va. 785, 310 S.E.2d 852 (1983.)

B. ARGUMENT

In the cross assignment of error section of their brief, Appellees misstate the holdings of the cases on which they rely as well as their alleged significance and applicability to the present case. First, the federal cases cited by Appellees neither state that a party is prohibited from obtaining the opinions of treating physicians through discovery, such as interrogatories, production requests, and depositions, nor state that a party who intends to call a treating physician at trial is protected from having to identify the expected testimony to be offered by such witnesses at trial if such information is requested in discovery. Rather, such cases merely state that the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure, which require automatic disclosures to be made for witnesses, including experts, do not require that hybrid witnesses -- who are expected to offer both fact and opinion testimony but who are not formally retained to prepare and offer expert opinions -- such as treating physicians, prepare detailed, written reports setting forth their opinions and the bases therefore. *See* Fed.R.Civ.P. 26(a)2(A) & (B). Instead, such hybrid witnesses generally only need to be identified in the automatic disclosures required by Fed.R.Civ.P. 26(a)(2)(A) and their opinions and expected trial testimony can then be obtained through individualized discovery, such as interrogatories and depositions. *See Sullivan*

v. Glock, Inc., 175 F.R.D. 497, 500-01 (D.Md. 1997); *Indemnity Ins. Co. of North America v. American Eurocopter LLC*, 227 F.R.D. 421, 423-25 (M.D.N.C. 2005).

Accordingly, while the federal cases cited by Appellees support that hybrid fact/expert witnesses, such as treating physicians, need not prepare detailed, written reports addressing their opinions and the bases therefore as required for formally retained expert witnesses under Fed.R.Civ.P. 26(a)(2)(B), nothing in such cases indicate that that a party may not seek to obtain information concerning the expected or intended testimony of such witnesses through interrogatories or depositions. Further, nothing in such cases indicate that a party who fails to disclose such requested information in discovery cannot be prohibited from calling such witnesses at trial.

As to West Virginia law on the subject, as of this date this Court, which has rule-making authority as to the West Virginia Rules of Civil Procedure, has never adopted the 1993 amendments to Rule 26 of the Federal Rules of Civil Procedure dealing with such automatic disclosures. Therefore, the federal cases cited and discussed by Appellees do not offer the assistance and support claimed or sought in their cross appeal, even if Appellees had properly interpreted the holdings of those cases.

Furthermore, this Court's decision in *State ex rel. Wiseman v. Henning*, 212 W.Va. 128, 132-34, 569 S.E.2d 204, 208-10 (2002), did not address whether any distinction existed between treating physicians and formally-retained expert witnesses for discovery or expert disclosure purposes. Rather, this Court held that a treating physician, who based his opinions on his education, training, and treatment of the plaintiff and similar patients, was entitled to offer his opinions at trial even if they were

somewhat novel and would not be subject to the gate-keeping requirements of *Daubert* which arose as a result of junk science and other novel and unaccepted scientific principles. *Id.* While this Court did note in dicta contained in a footnote that it agreed with the petitioner's contention that the testimony of a treating physician is qualitatively different from that of a physician hired solely to testify, it did not discuss such distinction in detail and expressly did not base the admissibility of such testimony on any such distinction. *Id.*, 212 W.Va. at 134 n. 2, 569 S.E.2d at 210 n. 2.

Accordingly, Appellees have not offered this Court any basis under West Virginia law to demonstrate that the trial court's decision excluding the testimony of Dr. Rodger Blake was erroneous under the facts and circumstances of the present case. The trial court was correct in denying Appellees the right to call Mrs. Toler's treating radiologist without disclosure. Therefore, Appellees' cross assignment of error should be denied.

V. CONCLUSION

For all of the foregoing reasons, Appellant requests that Your Honorable Court grant her Appeal, reverse the judgment below and remand the action for a new trial. Further, Appellant requests that Your Honorable Court award sanctions against the Appellees for their wrongful conduct. Lastly, Appellant requests that Your Honorable Court deny the Appellees' cross assignment of error.

MICHELLE JONES, in her
capacity as Administratrix of the
Estate of Julia Toler, Deceased

By Counsel

Marvin W. Masters, Esquire
West Virginia State Bar No. 2359
Richard A. Monahan, Esquire
West Virginia State Bar No. 6489
THE MASTERS LAW FIRM LC
181 Summers Street
Charleston, West Virginia 25301
(304) 342-3106

Julie N. Garvin, Esquire
West Virginia State Bar No. 8567
GARVIN LAW, LLC
424 Buckhannon Pike, Suite C
Nutter Fort, West Virginia 26301
(304 623-3333

Counsel for Appellant
F:\3\592\b008.doc

BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

APPEAL NO. 34619

MICHELLE JONES, in her
capacity as Administratrix of the
Estate of Julia Toler, Deceased,

Appellant,

v.

EDWARD R. SETSER, M.D.; ST. MARY'S
HOSPITAL OF HUNTINGTON, INC.; and
HUNTINGTON CARDIOTHORACIC
SURGERY, INC.,

Appellees.

CERTIFICATE OF SERVICE

I, Richard A. Monahan, counsel for Appellant, do hereby certify that a true and exact copy of the foregoing "Corrected Reply Brief of Appellant" was served upon:

D. C. Offutt
Cheryl A. Eifert
Offutt Nord, PLLC
949 Third Avenue, Suite 300
Post Office Box 2868
Huntington, West Virginia 25728
Counsel for Appellees

in an envelope properly addressed, stamped and deposited in the regular course of the United States Mail, this 1st day of July, 2009.

Richard A. Monahan